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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
v. *Petitioners,*

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
v. *Petitioner,*

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE STATE OF OKLAHOMA,
THE OKLAHOMA SCENIC RIVERS COMMISSION,
THE OKLAHOMA POLLUTION CONTROL
COORDINATING BOARD,
SAVE THE ILLINOIS RIVER (STIR) AND
THE OKLAHOMA WILDLIFE FEDERATION
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provisions of the Clean Water Act permitting a discharge of pollutants only if it would comply with "applicable water quality requirements" require compliance with the federally approved Water Quality Standards of an affected downstream State as well as those of the State in which the pollutants would initially be discharged.

(This first question is raised only by the Arkansas petition (No. 90-1262) because the affirmative answer given by the Court of Appeals was advocated by the Environmental Protection Agency (EPA) as well as the Oklahoma respondents. The second question stated below is raised by both the Arkansas petition and the EPA petition (No. 90-1266)).

2. Whether, assuming an affirmative answer to the preceding question, the Court of Appeals properly held that a discharge of sewage treatment effluent into a tributary of a specially protected scenic river would violate the prohibition of Oklahoma's federally approved Water Quality Standards (as in effect in November 1985) against any "further water quality degradation" in that river, where the EPA's findings and undisputed evidence showed that the result would be to increase the presence of pollutants that were already at excessive levels.

TABLE OF CONTENTS

	Page
STATUTES AND REGULATIONS INVOLVED.....	1
STATEMENT	6
A. The Statutory And Regulatory Scheme	6
B. The Proceedings Below	9
C. The Present Situation	14
REASONS FOR DENYING THE PETITION	15
I. NO SUBSTANTIAL ISSUE FOR REVIEW IS RAISED BY THE COURT OF APPEALS' AGREEMENT WITH EPA THAT DOWN- STREAM STATE STANDARDS APPLY TO NPDES PERMITS	16
II. NO ISSUE APPROPRIATE FOR REVIEW BY THIS COURT IS PRESENTED BY EITHER PETITIONER WITH RESPECT TO THE INTERPRETATION AND APPLICATION OF THE OKLAHOMA WATER QUALITY STANDARDS TO THE UNIQUE CIRCUM- STANCES OF THIS CASE	20
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:	Page
<i>Caiolo v. Carroll</i> , 851 F.2d 395 (D.C. Cir. 1988)....	22
<i>Champion International Corp. v. EPA</i> , 4th Cir. No. 91-2302	20
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	18
<i>Chevron U.S.A., Inc. v. Yost</i> , 919 F.2d 27 (5th Cir. 1990)	25
<i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981) ..	18, 23
<i>City of Sarasota v. EPA</i> , 813 F.2d 1106 (11th Cir. 1987)	8, 23
<i>E.I. DuPont De Nemours & Co. v. Train</i> , 430 U.S. 112 (1977)	18
<i>EPA v. California ex rel. State Water Resources Control Board</i> , 426 U.S. 200 (1976)	7, 8, 23
<i>Illinois v. City of Milwaukee</i> , 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985)....	19
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)	18, 19, 23
<i>National Wildlife Federation v. Federal Energy Regulatory Commission</i> , 912 F.2d 1471 (D.C. Cir. 1990)	19
<i>Natural Resources Defense Council, Inc. v. EPA</i> , 859 F.2d 156 (D.C. Cir. 1988)	7
<i>State v. Champion International Corp.</i> , 709 S.W.2d 569 (Tenn. 1986), vacated, 479 U.S. 1061 (1987)	19
<i>United States v. Larionoff</i> , 431 U.S. 864 (1977)....	22
<i>University of Cincinnati v. Bowen</i> , 875 F.2d 1207 (6th Cir. 1989)	22

Statutes and regulations:

Clean Water Act, 33 U.S.C. § 1251 <i>et seq.</i>	<i>passim</i>
§ 101(b), 33 U.S.C. § 1251(b)	6
§ 301, 33 U.S.C. § 1311	2, 17, 21
§ 303, 33 U.S.C. § 1313	2, 7, 21, 23
§ 401, 33 U.S.C. § 1341	3, 17
§ 402, 33 U.S.C. § 1342	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page
Oklahoma Scenic Rivers Act, Okla. Stat. Tit. 82 § 1452(b)(1) (1970)	6
40 C.F.R.:	
§ 122.4	4
§ 122.6	4, 14
§ 122.44	18
§ 124.85	13, 14
§ 131.4	21
§ 131.10	18
§ 131.20-22	8
Oklahoma Water Quality Standards	<i>passim</i>

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STATUTES AND REGULATIONS INVOLVED

Because the Clean Water Act and the pertinent Environmental Protection Agency (EPA) and Oklahoma regulations contain straightforward language that, in our view, conclusively answers the questions presented by the petitions, we set forth the most significant excerpts at the outset rather than in an appendix.

I. The most pertinent portions of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, provide as follows: *

§ 301, 33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—* * *

(1) (C) not later than July 1, 1977, any more stringent limitation [than standards specified by EPA], including those necessary to meet water quality standards * * * established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or * * * required to implement any applicable water quality standard established pursuant to this chapter.

§ 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the [EPA] Administrator.

* More extensive excerpts from each of these sections are set forth in greater detail in the separately bound Appendix to the Arkansas petition (Ark. Pet. App. 154a-171a).

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation. * * *

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. * * *

§ 401, 33 U.S.C. § 1341. Certification

(a) (1) Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with the applicable provisions of sections 1311, * * * 1313 [and other sections] of this title. * * *

(2) * * * Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. * * * Such agency * * *

shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

§ 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) * * * [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet * * * all applicable requirements under sections 1311 * * * [and other sections] of this title * * *.

[Subsections (b)-(d) provide for State permit programs, which supersede EPA's jurisdiction to issue permits, and specify EPA's role with respect to such programs.]

II. The Environmental Protection Agency's regulations with respect to the National Pollutant Discharge Elimination System (NPDES), 40 C.F.R. Part 122, provide as follows in pertinent part:

§ 122.4. Prohibitions * * *

No permit may be issued: * * *

(d) When the imposition of conditions cannot insure compliance with the applicable water quality requirements of all affected States * * *.

§ 122.6 Continuation of expiring permits.

(d) *State continuation.* (1) An EPA-issued permit does not continue in force beyond its expiration date under Federal law if at that time a State is the permitting authority. States authorized to administer the NPDES program may continue * * * EPA * * * permits until the effective date of the new permits, if State law allows. * * *

III. The 1982 Oklahoma Water Quality Standards ("OWQS"), as adopted by the Oklahoma Water Resources Board and approved by EPA under Clean Water Act § 303(c), *supra*, provide as follows in pertinent part: **

SECTION 1. INTRODUCTION. * * * The purpose of the Standards is to promote and protect as many beneficial uses as are attainable and to assure that degradation of existing quality of waters of the State does not occur.

SECTION 2. ADOPTION AND ENFORCEABILITY OF THE STANDARDS. The 1982 Oklahoma Water Quality Standards * * * are adopted as Rules and Regulations by the Oklahoma Water Resources Board * * * and are fully enforceable under the laws of Oklahoma. These standards shall apply to all waters of the State * * *.

SECTION 3. ANTI-DEGRADATION POLICY. * * * No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed. * * * No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in National and State parks, Wildlife Refuges, and those designated "Scenic Rivers" in Appendix A. * * *

SECTION 5. BENEFICIAL USE LIMITATIONS. All streams and bodies of water designated as (a) [in Appendix A] are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3.

** Sections 3 and 5 are set forth in full in the Appendix to the Court of Appeals opinion (Ark. Pet. App. 85a). The 1982 OWQS were set forth in full in the Addendum to Joint Brief-In-Chief of Petitioners/Appellants filed below in May 1989.

OWQS Appendix A (at p. 21) designates the "Upper ILLINOIS RIVER above 650 foot elevation level" as having both the "a" limitation and "Scenic River" status. The Scenic river status was conferred by Okla. Stat. tit. 82 § 1452(b) (1) (1970).

STATEMENT

This case concerns the interpretation of Oklahoma's federally-approved Water Quality Standards, as in effect on November 5, 1985, in the context of a request by the City of Fayetteville, Arkansas, for a permit under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to discharge treated sewage into a tributary of Oklahoma's Upper Illinois River, which has a specially protected status as a scenic river.

A. The Statutory And Regulatory Scheme.

1. In general, the petition of the Environmental Protection Agency (EPA) accurately describes the statutory scheme for approval or disapproval of discharges into interstate waters under the Clean Water Act and, in particular, the central role of State Water Quality Standards—such as those of Oklahoma here—under the National Pollutant Discharge Elimination System (NPDES) permit program established by § 402, 33 U.S.C. § 1342. See EPA Pet. 2-6. Rather than repeat that description here, we merely emphasize the salient points, most of which are apparent from the statutory excerpts set forth above.

2. The Act states a fundamental policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * *." § 101(b), 33 U.S.C. § 1251(b). To these ends, the States are required to adopt Water Quality Standards, and the Act provides for their enforcement. The purpose of the State Water Quality Standards is to supplement EPA's technology-based standards (which

determine the level and quality of pollutants that can be discharged at a particular point source), so as to assure against adverse cumulative effects from otherwise acceptable discharges. "Water Quality Standards are retained as a supplementary basis for effluent limitations * * * so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex. rel. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976).

3. The Clean Water Act further contemplates that the NPDES permitting process will for the most part be conducted by the States rather than by EPA. § 402(b), 33 U.S.C. § 1342(b). The procedure followed in this case—issuance of a permit in the first instance by EPA—occurred only because the State where the discharge in question originates (Arkansas) did not in 1985 have an approved permitting program in place. Since Arkansas now has such a program, and since the term of the EPA-issued permit under review here has expired, further proceedings on this matter would take place not at EPA but before the Arkansas Department of Pollution Control and Ecology, as described *infra*. And since at least thirty-nine of the States now have approved programs,¹ most such proceedings in the future will not be conducted as this one was, but rather will be before State agencies, subject only to the discretionary authority of EPA to object to the issuance of a particular permit under § 402(d) & (e), 33 U.S.C. § 1342(d) & (e).

4. Once a State's Water Quality Standards have been approved by EPA under § 303, 33 U.S.C. § 1313, they have the force of law. Neither the State adopting those standards nor a permitting agency (whether it be a State

¹ See *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 173 (D.C. Cir. 1988).

agency or EPA) has authority to deviate from those standards or excuse noncompliance with them in issuing an NPDES permit. See *EPA v. California ex rel. State Water Resources Control Board*, *supra*, 426 U.S. at 220; *City of Sarasota v. EPA*, 813 F.2d 1106, 1109 n.10 (11th Cir. 1987). Each State is, however, required to conduct a triennial review of its Water Quality Standards, with public hearings and EPA participation, and any new or altered Standards must have EPA's prior approval as "meet[ing] the requirements of [the Clean Water Act]." § 303(c)(3), 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 131.20-22. The Oklahoma Standards applicable to this case were adopted and approved by EPA in 1982. They have subsequently undergone two triennial reviews which have resulted in reapprovals by EPA, the latest on December 28, 1989. Both subsequent versions have included some changes in the language in issue here.² Another triennial review is scheduled to begin in May 1991.

5. The Oklahoma Water Quality Standards (OWQS) provide special protection for the Upper Illinois River, which is the Oklahoma body of water threatened by the Fayetteville sewage treatment plant, by designating it as an Oklahoma Scenic River and as subject to special "beneficial use limitations." Thus, the Upper Illinois River is protected by a federally approved and enforceable Standard categorically prohibiting any "new point source discharge of wastes" which would result in "water quality degradation". OWQS §§ 5, 3.³

² The standards applied below were those adopted and approved in 1982 because they were in effect when the permit was originally issued on November 5, 1985. See Second Order of EPA Chief Judicial Officer (CJO), Ark. Pet. App. 148a-150a. The CJO (speaking on behalf of the EPA Administrator) found that there was no material difference between the 1982 and 1985 OWQS (Ark. Pet. App. 150a). The Court of Appeals, however, disagreed (*id.* 52a).

³ As previously noted, these Standards are equally binding upon any discharges from point sources in Oklahoma. There has not been any suggestion that the Standards are anything other than

B. The Proceedings Below.

In 1985, the City of Fayetteville, Arkansas, applied to EPA for an NPDES permit allowing a new sewage disposal plant to discharge half of its effluent into a tributary of the Illinois river upstream from the Oklahoma border.⁴ As previously noted, the permit proceeding was before EPA because an approved State permitting program was not yet in place in Arkansas, as it now is. The State of Oklahoma, its agencies principally concerned with water quality and a nonprofit group called Save the Illinois River (STIR) opposed granting such a permit and evidentiary hearings ensued before an EPA Administrative Law Judge (ALJ). On review of the ALJ's initial decision recommending approval of the permit (Ark. Pet. App. 93a-107a), the EPA Administrator, acting through his Chief Judicial Officer (CJO), ruled that the Fayetteville discharges must satisfy Oklahoma's Water Quality Standards as well as those of Arkansas—a position to which the government has consistently adhered here and elsewhere as fundamental to the Clean Water Act scheme—and remanded for further examination of the question whether the proposed Fayetteville discharge would violate the OWQS (First Order, Ark. Pet. App. 108a-121a). The CJO held that the ALJ had erred in his premise that the standard to be applied was to be found in federal law and was whether the discharge

bona fide exercises of Oklahoma's duties under the Clean Water Act and Oklahoma statutes to protect all waters within that State, or that they are discriminatory against out-of-state point sources. The EPA Administrative Law Judge expressly found that the OWQS "do not amount to an attempt to establish a separate system for out-of-state sources since they apply equally to Oklahoma sources" (Ark. Pet. App. 125a).

⁴ Fayetteville had historically discharged all of its wastewater into the White River (which does not flow into Oklahoma), but even with the new treatment facility the White River was unable to assimilate the discharges from the Fayetteville plant without violating Arkansas' own Water Quality Standards.

would have an "undue impact" upon the Illinois River. Rather, the proper standard was simply whether the discharge would be in strict compliance with the terms of Oklahoma's federally approved Standards. Ark. Pet. App. 116a.

On remand, the ALJ concluded that the OWQS were not violated because, in the ALJ's words, the Oklahoma parties had failed to "show by substantial evidence that the City's discharge will create a nuisance or render the Illinois River in Oklahoma harmful, detrimental [sic] or injurious to any beneficial use of the river" (Ark. Pet. App. 126a-27a). Moreover, he relied upon the proposition that "the mere likelihood of being able to measure a difference [in pollutant levels in Oklahoma] is insufficient to show a violation absent a showing that such increases will cause increased eutrophication" (*id.* 130a).⁵ Upon appeal again to the CJO, the ALJ's approval of the permit on remand was affirmed on the Administrator's behalf (Second Order, Ark. Pet. App. 145a-153a). This Second (and final) Order held that the ALJ had correctly applied the "clear" language of the Oklahoma Standards (*id.* 152a) and that although he had failed to "mak[e] express reference to the anti-degradation policy, it was harmless error" because "it logically follows [from the ALJ's negative findings on measurable harm] that there will not be a 'quality degradation'" (*id.* at 153a).

Notwithstanding his conclusion in favor of the permit, the ALJ's decision on remand included findings recog-

⁵ The definition of eutrophication is discussed by the Court of Appeals at Ark. Pet. 46a but is not important for present purposes. The pertinent point here is that the EPA decision was based upon the proposition that the OWQS presented no bar to the Fayetteville discharge even if it delivered measurable pollutants to the Upper Illinois River in Oklahoma, so long as measurable deterioration of the River's condition was not shown to have specifically resulted. This is analogous to saying it is permissible to feed a person poison so long as he does not become clinically ill.

nizing that 20 to 25 percent of the nutrients discharged by Fayetteville would be present after the Illinois River crosses the Oklahoma border (Ark. Pet. App. 129a), that "6 lbs/day [of phosphorus from Fayetteville] would be bio-available to organisms over the Oklahoma border" (*id.*), and that there would be some increase in nitrogen (*id.* 130a). It is undisputed that these additional pollutants would not be allowed to be in the River but for the Fayetteville NPDES permit. The ALJ's findings were adopted by the Administrator in the CJO's Second Order (Ark. Pet. App. 151a).

Three petitions for judicial review of EPA's final decision (the Second Order) were filed in early 1989. The petition of the Arkansas parties (petitioners here) challenged EPA's authority to require, as a condition of an NPDES permit, that a discharger in an upstream State comply with the Water Quality Standards of a downstream State. The petitions by the Oklahoma parties (the present respondents) asserted that the issuance of the NPDES permit violated Oklahoma's Standards.⁶

The Court of Appeals' unanimous opinion affirmed EPA's interpretation of the Clean Water Act as requiring application of the federally approved Water Quality Standards of any affected downstream State as well as those of the State where a discharge occurs, and agreed with the CJO that the issue here was one of assuring strict compliance with the terms of the OWQS. The Court went on, however, to reverse EPA's final decision as "flawed by misinterpretation and misapplication of two important Oklahoma water quality regulations and by arbitrary disregard for certain expert testimony" (Ark. Pet. App. 44a). Although there were no State court decisions interpreting the OWQS, the Court found the plain language of these governing State regulations

⁶ The Arkansas petition was filed in the 8th Circuit, but was transferred to the 10th Circuit and consolidated with the Oklahoma petition. The Oklahoma Wildlife Federation intervened in the Court of Appeals.

to be clear and contrary to EPA's decision (*e.g.*, Ark. Pet. App. 47a-48a, 51a).

The Court of Appeals began its exegesis of State law by noting that the protected "beneficial uses" of the Upper Illinois River under the OWQS include "fish and wildlife propagation", "aesthetics" and "smallmouth bass", making the water quality criteria governing turbidity, nutrients and dissolved oxygen particularly significant and therefore necessitating consideration of the phosphorus and nitrogen undisputedly present in Oklahoma as a result of the Fayetteville discharge (Ark. Pet. App. 44a-45a). It held that EPA had misread the OWQS in failing to recognize that the nutrient criteria apply to the entire reach of the River in Oklahoma (*id.* 45a-46a). More generally, the Court rejected EPA's interpretation of the OWQS as protecting only against actual measurable injury to the River specifically traceable to the Fayetteville discharge:

"[W]e believe the plain language of the regulations manifests a clear intent to allow no degradation of the water quality of scenic rivers. More specifically, the regulations disallow any additional discharge of pollution (either a new point source or an increase from an existing source) to a scenic river if its water quality *has been degraded* or if the new source *would degrade it*." (Ark. Pet. App. 47a-48a)

"* * * We conclude the requirements of the Beneficial Use Limitations/Anti-Degradation Policy are violated when the water quality of a scenic river [such as the Upper Illinois] undergoes any human-caused, detectable change. By 'detectable change' we mean any detectable change in a water quality parameter such as turbidity or phosphorus * * *. We do *not* mean a detectable change that violates a numeric criterion for that parameter * * *, which criterion would otherwise apply if the Beneficial Use Limitations were not applicable (*i.e.*, if the receiving waters were not designated as a scenic river or otherwise as '(a)' in [OWQS] Appendix A)." (Ark. Pet. App. 49a)

Moreover, the Court noted that the ALJ had improperly put the burden of proof with respect to degradation upon the Oklahoma opponents of the permit, rather than on the Arkansas proponents, in violation of the EPA regulation governing hearings on EPA-issued permits (Ark. Pet. App. 52a-53a).⁷

The Court of Appeals went on to determine that, as a matter of fact, it was undisputed that the water quality of the Upper Illinois River was already degraded under the criteria of the OWQS by excessive nutrients and turbidity (Ark. Pet. App. 55a-65a). Similarly, the record showed without contradiction, and indeed contained findings recognizing, that substantial amounts of phosphorus, nitrogen and other organic pollutants put into the water by the Fayetteville plant would remain after the River entered Oklahoma (Ark. Pet. App. 65a-67a). See pp. 10-11, *supra*. Finally, the Court found undisputed evidence that such pollutants are of a type that would tend to degrade further the quality of Upper Illinois River waters (Ark. Pet. App. 67a-72a).

The Court of Appeals rejected the contention that an inability to detect the Fayetteville effluent's "individual impact on Illinois River water quality" would suffice to satisfy the OWQS, explaining that

"If we were to accept this logic, once water quality standards in a stream were violated, additional new discharges might be permitted indefinitely so long as each one would have an unmeasurable individual impact. The absurdity of such a policy is manifest." (Ark. Pet. App. 78a)

Therefore, the Court

"reject[ed] any notion that, once water quality standards [such as those stated in the OWQS]

⁷ 40 C.F.R. § 124.85(a)(1) provides that "The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift."

have been violated (i.e., the quality of the receiving waters has been degraded), the incremental impact of a proposed additional discharge must itself be detectable. * * * Rather, if a body of water is experiencing WQS violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be permitted if its effluent will reach the degraded waters." (Ark. Pet. App. 79a-80a)

Under this interpretation of the governing Oklahoma Standards, and given the undisputed evidence and findings of a discharge of pollutants of the kind that caused an existing degradation, the Court found no occasion for any remand to the permitting authority for any further proceedings. On these facts, no permit could be issued that would comply with the Oklahoma Standards as in force (with federal approval) at the time when the Fayetteville permit was initially issued.*

C. The Present Situation.

There has been no stay of the Fayetteville NPDES permit either before or since the Court of Appeals' decision. Thus, the sewage plant has been in operation and discharging its effluents since the permit was finally approved by EPA in December 1988. The EPA permit expired by its own terms after five years from the date of its original issuance, on December 9, 1990. An Arkansas permitting program having been put in place in the interim, the Arkansas Department of Pollution Control and Ecology has exercised its authority to continue the permit in effect pending a new permit proceeding,⁹ and such a proceeding has been commenced before that Department. In the meantime, the 1982 OWQS inter-

* In this regard, the Court reiterated that the burden of proof was on the advocates of the permit, as 40 C.F.R. § 124.85(a)(1) provides. See Ark. Pet. App. 72a n.49.

⁹ See 40 C.F.R. § 122.6(d).

preted and applied below have twice been amended (in 1985 and 1988) and each time approved by EPA as amended. Another triennial review of the OWQS is scheduled to begin in May 1991. Thus, both the Fayetteville permit and the Oklahoma Water Quality Standards will soon be under active administrative review, by the States of Arkansas and Oklahoma respectively.

REASONS FOR DENYING THE PETITION

The petitions come to the Court in a somewhat complex and unusual posture. The first issue—whether Oklahoma's Water Quality Standards apply at all—is presented only by the Arkansas petition; EPA and the Oklahoma respondents are in agreement that the Court of Appeals correctly held that the OWQS must be satisfied. The second issue—whether the Court of Appeals properly interpreted the OWQS and applied them to the facts of this case—is presented by both the EPA and Arkansas petitions, but they frame rather differently their objections to the decision below and the propositions that they ask this Court to decide. The Arkansas petitioners apparently ask this Court to rule that even though downstream States' Water Quality Standards do apply, and even though the Oklahoma Standards applied below were approved by EPA, the Clean Water Act somehow invalidates those Standards insofar as they would preclude further discharges of pollutants in upstream States. The Solicitor General, on the other hand, does not challenge the Oklahoma Standards, but more modestly asks the Court to hold that the Court of Appeals did not pay proper deference to EPA's lenient interpretation of them.

Certiorari should be denied as to the Arkansas petition's first question because there is no substantial issue as to the correctness of the Court of Appeals' holding that the Water Quality Standards of a downstream State apply to NPDES permits under the Clean Water Act and that holding does not conflict with any decision

of any other court of appeals, State court of last resort or this Court.

Certiorari should be denied as to both petitions' complaints about the Court of Appeals' interpretation and application of the Oklahoma Water Quality Standards in this case because they present no focused issue of general significance for this Court to decide, much less any issue as to which there is any conflict among the lower courts. The Court of Appeals correctly interpreted and applied those Standards in accordance with their plain language. Moreover, this case is inappropriate for further review because the NPDES permit considered below has now expired and can be renewed only by a different agency which must examine current circumstances.

I. NO SUBSTANTIAL ISSUE FOR REVIEW IS RAISED BY THE COURT OF APPEALS' AGREEMENT WITH EPA THAT DOWNSTREAM STATE STANDARDS APPLY TO NPDES PERMITS.

The decision below on the Arkansas petition's first question does not—as the petition would have it—involve any fundamental principle of federalism. The Court of Appeals simply gave the unambiguous language of the Clean Water Act its plain meaning. The petition's claims of conflict with decisions of this Court and lower courts will not withstand analysis. And the petition's prediction that this interpretation will “disrupt administration of the Clean Water Act” (Ark. Pet. 13) has not been borne out in the years in which the NPDES program has operated under regulations embodying the same interpretation.

The Administrative Law Judge (Ark. Pet. App. 125a) and the EPA Administrator (speaking through the Chief Judicial Officer, *id.* 116a-117a) found the statutory language “clear” and “plain and straightforward” on this point. After detailed consideration, the Court of Appeals similarly concluded that the Clean Water Act could not be read otherwise. *Inter alia*, the Court explained that

“[T]houghtful consideration of the language of [§ 301(b)(1)(C), 33 U.S.C.] § 1311(b)(1)(C)—

there shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations . . . or required to implement any applicable water quality standard established pursuant to this chapter

(emphasis added)—exposes the irrationality of Arkansas's argument. In order to ensure that the EPA-approved water quality standards in all states are ‘met’ or ‘implemented,’ it is ‘necessary’ to require dischargers to meet the applicable requirements of other affected states as well as those of the source state. There could be no assurance of achieving a state's more stringent WQS if an upstream, out-of-state discharger were not required to comply with those standards.” (Ark. Pet. App. 22a-23a)¹⁰

The Court of Appeals confirmed this interpretation by an exhaustive analysis of the entire statutory and regulatory scheme as well as the legislative history (Ark. Pet. App. 19a-24a, 29a-43a).¹¹ It also found strong support in EPA's implementing regulations, which provide *inter alia* that no permit shall be issued absent “compliance with the applicable water quality requirements of *all affected states*” (Ark. Pet. App. 18a-19a, quoting 40

¹⁰ The Court noted that § 402 dictates that NPDES permits must ensure compliance with all the requirements of Section 301, 33 U.S.C. § 1342(a)(2) and (b)(1)(A). Ark. Pet. App. 20a.

¹¹ The Court further held that “[b]ased on its plain language * * * we agree with EPA that the purpose of [§ 401(a)(2), 33 U.S.C. §§ 1341(a)(2)], requiring ‘compliance with applicable water quality standards’ must be to enable affected states to ensure that their water quality will not be jeopardized by a discharge in another state. Only a strained interpretation of the statute could produce the result Arkansas seeks—that ‘applicable water quality requirements’ refers to the WQS of only the source state.” (Ark. Pet. App. 31a).

C.F.R. § 122.4(d)).¹² Any other interpretation, the Court noted, would encourage "pollution shopping" in derogation of the Act's underlying purpose of enforcing strict standards nationwide (Ark. Pet. App. 23a).

The Court of Appeals correctly held that "[t]his is an issue of first impression in the circuit courts," i.e., there is no conflict (Ark. Pet. App. 14a), and that the Arkansas argument is not supported by *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (*id.* 25a-28a, 22a n.9). As the Court of Appeals explained, *International Paper's* holding that a non-source State's common law of nuisance was preempted by the Clean Water Act does not detract from the statutory provisions requiring the States to adopt Water Quality Standards and specifically incorporating them into the permitting process.¹³ The summary description of the NPDES system in *International Paper* upon which the Arkansas petition relies most heavily was plainly dictum which did not purport to prescribe answers to particularized statutory questions that were in no way before this Court in that case, and in any event the holding below is consistent with it.¹⁴

¹² To the same effect, the Court of Appeals also quoted from § 122.44(d)(4) and § 131.10(b). Such implementing regulations are, of course, authoritative indicators of statutory meaning. *E.g.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977).

¹³ *A fortiori*, the questions as to preemption of federal common law discussed in *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981), have nothing to do with this case.

¹⁴ The generalization that a non-source State "does not have authority to block the issuance of the permit," 479 U.S. at 490, is not inconsistent with the holding below that the entities which do have such authority (the certifying source State and the permitting agency) must consider the statutorily mandated and EPA-approved Water Quality Standards of the affected non-source State. The rationale of the *International Paper* decision was that "application of Vermont law [rather than New York law] against IPC would

Nor is there any conflict between the decision below and the lower court cases from which the Arkansas petition also attempts to distill categorical disapproval of any downstream State limitation on pollutant discharges. *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985), dealt only with the same issue later definitively decided in *International Paper*. Moreover, as the Court of Appeals noted below, the Seventh Circuit itself recognized the distinction between the situation before it—where an affected State was seeking to enjoin a discharge from another State under its own common law of nuisance—and assertion of an affected State's rights under the Clean Water Act permit provisions themselves (Ark. Pet. App. 25a).¹⁵

The only Clean Water Act issue in *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990), was whether the discharger was obliged to obtain a § 401 certificate from Oklahoma on the theory that effects there made Oklahoma in effect a source State. The District of Columbia Circuit simply held that it was not.¹⁶

The only other conflict asserted in the Arkansas petition—with a State court decision in *State v. Champion International Corp.*, 709 S.W.2d 569 (Tenn. 1986), which

allow respondents to circumvent the NPDES permit system * * *." *Id.* at 494. In this case, of course, Oklahoma has sought to enforce, not circumvent, the NPDES statutory provisions.

¹⁵ Indeed, the passage from the Seventh Circuit's opinion quoted at Ark. Pet. 17-18 itself negates the generalization the petition attempts to derive from it. It specifically makes an exception for situations where the Clean Water Act has "provisions expressly protecting the interests of other states." As we have shown, there are several such provisions relating to the issuance of permits.

¹⁶ The State of Oklahoma was no longer a party, having previously agreed to a settlement with Arkansas in that matter. See 912 F.2d at 1474.

this Court vacated for further consideration in the light of *International Paper*, 479 U.S. 1061 (1987)—has no more substance. That decision involved only claims brought in Tennessee court under Tennessee statutes and common law, and said nothing about the role of State Water Quality Standards under the Clean Water Act.¹⁷

II. NO ISSUE APPROPRIATE FOR REVIEW BY THIS COURT IS PRESENTED BY EITHER PETITIONER WITH RESPECT TO THE INTERPRETATION AND APPLICATION OF THE OKLAHOMA WATER QUALITY STANDARDS TO THE UNIQUE CIRCUMSTANCES OF THIS CASE.

Strictly speaking, the second question framed by the Arkansas petition is a non-issue; in the words of Arkansas' statement of the question, the Court of Appeals did not hold (and no party has urged) that "a pre-existing violation of water quality standards * * * automatically precludes the issuance of new permits" (Ark. Pet. i.). All that the Court of Appeals held is that, in the light of undisputed facts and findings concerning the condition of the Upper Illinois River at the time of the EPA permit proceeding below, the 1982 Oklahoma Water Quality Standards approved by EPA precluded any discharge into that River of the additional pollutants produced by the Fayetteville sewage plant because pollutants of those kinds had already reduced the River's water quality below acceptable standards. What the situation might be as to other rivers in other States with different Water Quality Standards, or even as to the same river in the light of potentially changing conditions and

¹⁷ The question of the applicability of downstream States' Water Quality Standards has recently been raised in the Court of Appeals for the Fourth Circuit by a petition for review of a subsequent EPA decision following the decision below on this issue. *Champion International Corp. v. EPA*, 4th Cir. No. 91-2302, filed January 3, 1991. If, as is extremely unlikely, the Fourth Circuit were to disagree with the decision below, that would be time enough for this Court to consider whether the issue is appropriate for its review.

Standards, was obviously not decided by the Court of Appeals.

Insofar as the Arkansas petitioners now ask this Court to hold that the Clean Water Act or some other federal law categorically precludes the adoption or application of any such State Water Quality Standard, they are foreclosed by their failure to make any such argument in the proceedings below. In any event, it is plain from the face of the Arkansas petition that there is no authority for any such argument. The petitioners cite no statute or other specific source of prohibition and do not even attempt to deal with the Clean Water Act provisions which broadly require States to adopt Water Quality Standards and require NPDES permits to comply with them without specifying any limitation except that they must be approved by EPA (as the 1982 OWQS were).¹⁸

EPA's present argument that its approval of the Fayetteville permit should have been affirmed as an exercise of reasonable administrative latitude in its application of the 1982 Oklahoma Standards is at odds with its position in the administrative proceedings below (articulated particularly clearly in the Chief Judicial Officer's First Order) that the OWQS were to be strictly applied. EPA's present position more closely resembles

¹⁸ The Act (*e.g.*, 33 U.S.C. § 1311(b)(1)(C)) and EPA's implementing regulations (*e.g.*, 40 C.F.R. § 131.4) specifically encourage the States to impose stringent Water Quality Standards. Both the CJO (Ark. Pet. App. 117a & n.15) and the Court of Appeals (Ark. Pet. App. 76a) so recognized. See also pp. 6-7, *supra*.

There is no basis for the Arkansas petition's apparent suggestion—not argued below—that § 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), implicitly limits what a State's Water Quality Standards can do to prevent further degradation of already polluted waters. Section 303(d) requires States to establish numerical limits on pollutant discharges into such waters, but does not in any way purport to preclude a State from adopting more stringent "narrative" standards simply forbidding any further discharge of pollutants into specified waters.

the initial position of the Administrative Law Judge roundly rejected in the First Order—which was that “federal law” left room for administrative balancing of the Oklahoma restriction against other considerations. See pp. 9-10, *supra*. The First Order correctly held that the Act required “strict compliance” with the OWQS (Ark. Pet. App. 116a), and the Administrator never purported to exercise the latitude that he now argues he was improperly denied.

For the same reason, the familiar principle of deference to a federal agency’s interpretation of its *own* regulations could not support EPA’s present argument, even if that principle included *State* regulations, like those here, which are adopted by a federal statute. The EPA petition’s invocation of the principle depends upon the premise that “the terms of [the Oklahoma] standard are ambiguous or silent” on the point in question (EPA Pet. 18). But the Administrator’s decisions below expressly rejected any such characterization of the OWQS (Ark. Pet. App. 152a) and the Court of Appeals found that the permit violated their clear and unambiguous requirements. Even if the Administrator had purported to work within a zone of “reasonable interpretation of the OWQS, the Court of Appeals has determined—correctly—that his interpretation was unreasonable. Such a determination is well within the normal scope of judicial review even where an agency’s interpretation of its own regulations is in issue. *E.g.*, *University of Cincinnati v. Bowen*, 875 F.2d 1207, 1209 (6th Cir. 1989); *Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988); see, *e.g.*, *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (no deference to administrative interpretation if it is “plainly erroneous or inconsistent with the regulation”).¹⁹

¹⁹ Indeed, the failure of the permit decision to follow the rule on burden of proof set out in EPA’s own regulations (p. 13, *supra*) was by itself sufficient ground for reversal.

The fact that EPA has the power to disapprove or modify State Water Quality Standards when they are adopted or amended (EPA Pet. 18) diminishes rather than enhances its claim of a need for latitude to mitigate their application in particular cases. The appropriate method for dealing with any possible interference with national policies that might develop from application of the standards adopted by Oklahoma or some other State is through the triennial review process which re-examines each State’s standards in the light of experience and provides for their modification as necessary.²⁰ The Act is clear, however, that duly approved standards are to be strictly enforced unless and until they are so modified. See *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 220 (1976); *City of Sarasota v. EPA*, 813 F.2d 1106, 1109 n.10 (11th Cir. 1987). The logic of EPA’s position in this Court is particularly questionable in the light of the fact that NPDES permits are now predominantly issued by State agencies in source States; surely EPA does not suggest that a source State’s agency should have flexibility to mitigate the application of a downstream State’s restrictions by liberal “interpretation”.²¹

²⁰ Thus, if EPA truly believes that the 1982 OWQS imposed “administratively unworkable” and “draconian” restrictions (EPA Pet. 23-25), it has had—and will soon have again—the means to make them consistent with the purposes of the Act, which are designed to take into account all uses of affected waters. § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). We doubt, however, that counsel’s alarmist rhetoric would withstand analysis in the more dispassionate forum of the triennial review of the OWQS that is about to begin.

²¹ EPA’s role and powers in exercising its discretion to object to State permit decisions are obviously not before the Court in this case. Thus, any questions as to how they should be exercised must await another day.

The EPA petition’s reliance upon this Court’s *Milwaukee* and *International Paper* decisions (EPA Pet. 13-15) is no more apposite than the Arkansas petition’s reliance upon such cases in the first

At most, the petitioners present the question whether the Tenth Circuit correctly interpreted Oklahoma's prohibition against further "degradation" of the Upper Illinois River and whether it properly relied upon the undisputed evidence (and ALJ findings) that significant amounts of harmful pollutants from the Fayetteville sewage plant would be present in Oklahoma. EPA's intricate argument that such "degradation" occurs only when measurable *injury* is documented—rather than simply when it is determined that harmful pollutants are added to the river by a new discharge—presents no question of federal law warranting this Court's attention. Even if the Tenth Circuit had been wrong in the latter interpretation and in its assessment of the undisputed evidence, its interpretation focused only on one State's Water Quality Standards as in effect at a particular time, and its assessment of the evidence peculiar to this case presents no issue of general significance.²² For these

question's challenge to EPA's application of downstream standards. Those cases involved the role of federal and State common law apart from the Clean Water Act's statutory scheme, not the role of State regulations expressly mandated by and incorporated in that statutory scheme after federal approval.

²² The correctness of the Court of Appeals' interpretation is plain from the language of the OWQS read in the light of the important protective role State Water Quality Standards have in the Clean Water Act scheme. That the Fayetteville discharges have a tendency to "degrade" the waters into which they flow is all but self-evident from the fact of the proposal to divert half of those discharges into the Illinois River rather than continue to deposit all of them into the intrastate river that previously received them. If the discharges were innocuous, there would have been no need to put any of them into the Illinois River.

The Court of Appeals simply held that under the Oklahoma Standards there could be no additional discharges of pollutants into a river that had already been determined to contain higher levels of those pollutants than it could stand. There is no scientific complexity in the Court's determination that the EPA record so demonstrated without dispute, and indeed the ALJ had so recognized in findings that the Administrator did not question. The holding below is thus analogous to the common sense proposition that a patient

reasons, the decision below concerning the interpretation and application of Oklahoma's Standards cannot have the sweeping and dire consequences portrayed by the petitions, but is narrowly limited by place and time.

As previously noted, the EPA-issued permit reviewed below has not been stayed but expired in December 1990. The Fayetteville plant continues to operate under temporary authority granted by the Arkansas Department of Pollution Control and Ecology (ADPCE), which has superseded EPA as the administrator of the relevant permit program. That Department is currently considering Fayetteville's application for a renewal of the permit for a new five-year term. While the Court of Appeals' decision establishes the law to be applied in such subsequent proceedings, the City of Fayetteville would naturally not be precluded from contending that there have been pertinent changes in the Oklahoma Water Quality Standards (which have been amended twice with EPA approval²³) or that evidence about the actual effects of the Fayetteville discharge and the current condition of the Upper Illinois River could require a different outcome at this time. Conversely, the opponents of the permit might well now be able to adduce evidence requiring denial of a renewal even under the incorrect criteria applied by EPA, thereby mooting the interpretation issue. These evolving circumstances under-

should not be given any more of a substance that has made him sick, without any need for a clinical determination as to how much sicker it would make him. It has been held in a related context that discharging a forbidden substance violates the Clean Water Act without any need to prove actual injury. *Chevron U.S.A., Inc. v. Yost*, 919 F.2d 27 (5th Cir. 1990).

²³ As previously noted, EPA's CJO and the Court of Appeals were in disagreement as to whether the 1985 amendments made any substantive change. The impact of the 1988 amendments and any further amendments in the 1991 triennial review will remain to be considered.

score the inappropriateness of further review of this case.²⁴

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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²⁴ Obviously, any question as to whether the Court should have remanded to EPA rather than reversing its permit approval (EPA Pet. 25-26) is moot because the EPA permit reviewed below has expired and EPA now has no jurisdiction to grant a permit for an Arkansas discharge. § 402(c)(1), 33 U.S.C. § 1342(c)(1).